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No. 00-1774

Supreme Court, U.S.
FILED
JUN 25 2001
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

ARTHUR CALDERON, Warden of the California State Prison at San Quentin, *Petitioner*

v.

ALFRED ARTHUR SANDOVAL, *Respondent.*

ON OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*
(SUPREME COURT RULES, RULE 39)

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COMES NOW Respondent ALFRED ARTHUR SANDOVAL in the above-entitled matter and presents this motion for leave to proceed *in forma pauperis*. This motion is based on Supreme Court Rules, Rule 39, and is based on the following facts.

Respondent is an indigent death row inmate at the California State Prison at San Quentin, California. Respondent seeks to file in this Honorable Court a Brief in Opposition to the Petition for Writ of Certiorari submitted by Petitioner Calderon to the Court of Appeals for the Ninth Circuit, which issued its operative ruling in this case on February 21, 2001. On December 11, 1995, Respondent was assigned the appointed the counsel referenced below by the Honorable United States District Court Judge Manuel L. Real. Said appointment of counsel was made pursuant to 18 U.S.C. Section 3006A and Local Rule 26.8.4 of the United States District Court, Central District, California. Leave to proceed *in forma pauperis* has not been sought by Respondent in any other court. As Respondent was appointed counsel pursuant to federal statute, no affidavit or declaration accompanying this motion is required.

For the foregoing reasons, Respondent ALFRED ARTHUR SANDOVAL respectfully requests that this court grant his motion for leave to proceed *in forma pauperis*.

DATED: June 21, 2001.

LAW OFFICES OF MICHAEL S. MAGNUSON

By: _____
MICHAEL S. MAGNUSON, Attorney for
ALFRED ARTHUR SANDOVAL

LAW OFFICES OF MANUEL U. ARAUJO

By: _____
MANUEL U. ARAUJO, Attorney for
ALFRED ARTHUR SANDOVAL

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action; my business address is 13215 E. Penn Street, Suite 205, Whittier, California 90602. On June 22, 2001, I served the foregoing document(s) described as MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS on the interested parties in this action as follows:

____ **By FAX transmission**

_X_ **By placing** _____ the original _X_ a true copy thereof enclosed in sealed envelopes addressed as follows:

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_X_ **BY MAIL:**

_X_ I deposited such envelope in the mail at Whittier, California. The envelope was mailed with postage thereon fully prepaid.

_X_ As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with the U. S.Postal Service on that same day with postage thereon fully prepaid at Whittier, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after day of deposit for mailing in affidavit.

___ **BY PERSONAL SERVICE** -- I caused such envelope to be delivered by hand to the offices of the addressee. **Proof of Service** to be filed.

_X_ **(State)** I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

__ **(Federal)** I declare that I am employed in the office of a member of the Bar of this court at whose direction the service was made.

SANDRA PEREZ
Name of Declarant

Signature of Declarant

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED
CAPITAL CASE

1. Whether the Court of Appeals' definition of the term "pending case" to include habeas petitioners who have filed requests for appointment of counsel presents a sufficiently significant conflict with the decisions of other Circuits to merit certiorari, given the fact that the resolution of this issue: (a) is irrelevant to the ultimate outcome of this case, (b) affects a limited and diminishing number of cases, and (c) reflects still developing issues of law surrounding the interpretation of this Court's decision in *Hohn v. United States, 524 U.S. 236.*

2. Whether the Court of Appeals, applying post-AEDPA law, would have been required to defer to the State Court's determination of harmless error, where the prosecutor violated Petitioner's Eighth Amendment rights by invoking the authority of the Bible in arguing for death during the penalty phase of the trial.

List of Parties

The parties to this action are Petitioner Warden Arthur Calderon ("the Warden") and Respondent Alfred Arthur Sandoval ("Mr. Sandoval").

TABLE OF CONTENTS

	Page(s)
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
SUMMARY OF REASONS FOR DENYING WRIT	3
ARGUMENT	4
I THE COURT OF APPEALS, BY APPLYING PRE-AEDPA LAW TO THIS CASE, DOES NOT CREATE A SUFFICIENT CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS THAT WOULD MERIT CERTIORARI	4
II. THE RESULT IN THIS CASE WOULD BE NO DIFFERENT IF AEDPA RULES FOR FEDERAL REVIEW OF STATE COURT DECISIONS ARE APPLIED	8
CONCLUSION	13

TABLE OF AUTHORITIES

Cases	Page(s)
Blyew v. United States, 80 U.S. 581, (1871)	7
Brecht v. Abrahamson, 507 U.S. 619 (1993)	13
Calderon v. United States District Court (Beeler), 182F.3d 1283 (9th Cir. 1997)	7
Calderon v. United Sates District Court (Kelly V), 163 F.3d 530 (9th Cir. 1998)	3, 4, 7, 8, 13
Caldwell v. Mississippi, 472 U.S. 320 (1985)	10, 12
Chapman v. Californian, 386 U.S. 18 (1968)	12
Darden v. Wainwright, 477 U.S. 168 (1986)	10
Evans v. Thigpen, 809 F.2d 239 (5th Cir. 1987)	10
Ex Parte Quirin, 317 U.S. 1 (1942)	7
Gilliard v. Mississippi, 464 U.S. 867 (1983)	6
Godfrey v. Georgia, 446 U.S. 420, 428 (1980)	12
Gosier v. Welborn, 175 F.3d 504 (7th Cir. 1999)	5
Hohn v. United States, 524 U.S. 236 (1998)	3,4,5,67,8,13
Jones v. Kemp, 706 F. Supp. 1534 (N.D. Ga. 1989)	10, 11
Lindh v. Murphy, 521 U.S. 320, 327 (1997)	4, 5
McCray v. New York, 461 U.S. 961, 963 (1983)	6
McElroy v. United States, 445 U.S. 642, 643 (1982)	6
McFarland v. Scott, 512 U.S. 849 (1994)	4, 5
Marks v. United States, 430 U.S. 188, 189 (1977)	6
Moore v. Gibson, 195 F.3d 1152 (10th Cir. 1999)	5

	Page(s)
People v. Sandoval, 4 Cal.4th 155 (1992)	2, 12
People v. Wrest 3 Cal.4th 1088 (1992)	12
Ramdass v. Angelone, 120 S. Ct. 2113 (2000)	11, 13
Sandoval vs. California, 511 U.S. 1 (1994)	2
Sandoval v. Calderon, 241 F.3d 765 (9th Cir. 2000)	2, 12
Slack v. McDaniel, 120 S. Ct. 1595 (2000)	7
United States v. Brown, 206 U.S. 240, 244 (1907)	7
United States v. Givy, 818 F.2d 120 (1st Cir. 1987)	10
Williams v. Coyle, 167 F.3d 1036 (6th Cir. 1999)	5
Williams v. Taylor, 120 S. Ct. 1479 (2000)	11, 13
Statutes	
21 U.S.C. § 848(q)	4, 5
28 U.S.C. § 2242	5
28 U.S.C. § 2253(c)	7
Other	
Robert L. Stern, Eugene Gressman, Steven M. Shapiro & Kenneth S. Geller, Supreme Court Practice, § 4.4 at 168 (7th Ed. 1993)	6

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Respondent ALFRED ARTHUR SANDOVAL respectfully submits this brief in opposition to the Petition for Writ of Certiorari to the Court of Appeals for the Ninth Circuit filed herein by petitioner, Arthur Calderon, Warden of the California State Prison at San Quentin.

I

STATEMENT OF THE CASE

Petitioner was arraigned in Los Angeles County Superior Court on July 8, 1985, charged with two counts of murder and a single count of attempted murder occurring on October 13, 1984 (the Belvedere Park Homicides) and two counts of murder occurring on October 31, 1984 (the Wells homicides). Trial commenced November 25, 1986. Guilty verdicts of first degree murder were returned as to the Belvedere Park shootings on February 12, 1987 and as to the Wells shootings on February 23, 1987, along with a multiple-murder special circumstance finding and one count of attempted murder.

The penalty phase of the trial commenced March 2, 1987. The jury began deliberations March 12, 1987. On March 18, the foreman advised the trial court that the jury was hopelessly deadlocked, reporting a split of six to six on counts 1 and 2 and five to seven on counts 3 and 4. The foreman stated that there was no reasonable possibility of arriving at a verdict through further deliberations. The court admonished the jury and instructed them to return the next day. The next morning, despite its previous unequivocal deadlock, the jury returned its verdicts of life without parole as to counts 1, 2 and 3, and a verdict of death as to count 4, the Marlene Wells conviction. On May 15, 1987, judgment was imposed and Petitioner was sentenced to death.

On December 14, 1992, the California Supreme Court affirmed the convictions and sentences. *People v. Sandoval, 4 Cal.4th 155 (1992).* Thereafter, the United States Supreme Court also affirmed. *Sandoval vs. California, 511 U.S. 1 (1994).* Petitioner also filed a petition for writ of habeas corpus with the California Supreme Court. That petition was denied "on the merits" July 7, 1993.

Petitioner filed a request for appointment of counsel and stay of execution in the United States District Court on December 7, 1994. A petition for writ of habeas corpus was filed in the United States District Court July 1, 1996, and an amended petition was filed July 29, 1996.

Thereafter, Respondent's motions for judgment on the pleadings and for partial summary judgment were granted as to various of the claims in the petition. The court held an evidentiary hearing on one claim, which was denied. On April 2, 1999, judgment was entered by the District Court granting in part and denying in part Mr. Sandoval's petition. The District court granted the writ with respect to claim 7 of the Petition, where Petitioner alleged that the Belvedere Park and Wells counts were improperly joined at trial.

The parties filed cross-appeals in the United States Court of Appeals for the Ninth Circuit. The Court of Appeals issued its original order November 6, 2000, and an amended order February 21, 2001. *Sandoval v. Calderon, 241 F.3d 765 (9th Cir. 2000).* The Appellate Court reversed the District Court's judgment granting the writ with respect to the severance issue, but affirmed the granting of the writ on the grounds of improper prosecutorial argument. both parties have filed petitions for writ of certiorari in the United States Supreme Court.

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/ / / / /

II

SUMMARY OF REASONS FOR DENYING THE WRIT

The Ninth Circuit decision in *Calderon v. United Sates District Court (Kelly V), 163 F.3d 530 (9th Cir. 1998),* followed by the court in the instant case, does not create a sufficient conflict with the decisions of other Courts of Appeals on the applicability of the AEDPA that would merit certiorari. First, as discussed more fully below, the Court of Appeals' reasoning on this issue is irrelevant to the outcome of this case, since the court's decision would be the same even if post-AEDPA law applied. Second, this issue is not a matter of sufficient importance to merit review, since it affects a limited and rapidly decreasing number of habeas petitioners. Lastly, there is no immediate need for this court to exercise its certiorari jurisdiction to resolve any conflict, since the law on this issue is likely to further develop. Other Circuits should be afforded a similar opportunity to interpret the AEDPA in light of *Hohn v. United States, 524 U.S. 236 (1998).*

Even if post-AEDPA law is applied, the result in this case would be no different. Under the AEDPA a state determination may be set aside by the federal court where it is contrary to clearly established federal law as determined by the Supreme Court of the United States. Here, the California Supreme Court found that the prosecutor violated both the California and the United States Constitutions when, at the close of the penalty phase trial, he paraphrased from the Bible in arguing to the jury that the death penalty was sanctioned by God. While the state court concluded that the error was harmless, the Ninth Circuit held the argument to be both improper and highly prejudicial. In reaching its decision, the Court of Appeals specifically relied on well-established United States Supreme Court precedent.

/ / / / /

ARGUMENT

I

THE COURT OF APPEALS, BY APPLYING PRE-AEDPA LAW TO THIS CASE, DOES NOT CREATE A SUFFICIENT CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS THAT WOULD MERIT CERTIORARI

A. The Issue Is Still Developing In the Courts of Appeal.

The court below held that Mr. Sandoval's original habeas petition was timely because, under *Calderon v. United States District Court (Kelly), supra, 163 F.3d 530, 540*, his request for appointment of counsel and application for stay of execution qualified as "case" that was pending at the time the AEDPA was enacted. *Kelly V* was based on the reasoning of *Hohn v. United States, supra., 524 U.S. 236*, in which the court concluded that a preliminary pleading filed in a court should be treated, for jurisdictional purposes, as an indivisible part of the overall "case" in that court. The Warden avers that a conflict now exists among the circuit courts with respect to whether an application for appointment of counsel pursuant to *21 U.S.C. § 848(q)* creates a pending case within the meaning of *Hohn*.

AEDPA's provisions for federal review of state prisoner petitions do not apply to cases that were pending prior to its effective date, April 24, 1996. See *Lindh v. Murphy, 521 U.S. 320, 327 (1997)*. The Ninth Circuit has held that the *Lindh* rule renders AEDPA inapplicable to cases in which an application for habeas corpus relief had not been filed on or before April 24, 1996, but in which an application for appointment of counsel under *21 U.S.C. § 848(q)* had been filed on or before that date. In *McFarland v. Scott, 512 U.S. 849 (1994)*, the Supreme Court concluded that "a

habeas corpus proceeding is pending," as that phrase is used in the stay provision of Chapter 153 of the habeas corpus statute, if a petition for habeas corpus relief has been filed before that date or if an indigent capital prisoner's application for appointment of counsel had been filed as of that date. There is no meaningful distinction between the "cases pending" language of *§ 107(c)*, which, as *Lindh* concluded, "implicitly" governs the applicability of the amendments to Chapter 153, and the "proceeding. . . pending" language of Chapter 153's stay provision that was interpreted in *McFarland*. Consequently, *McFarland's* conclusion that a habeas proceeding is pending when a capital prisoner's application for the mandatory appointment of counsel has been filed establishes that a habeas corpus "case" also is "pending" on that date.

Respondent acknowledges that several circuits have reached a conclusion contrary to the Ninth Circuit with respect to this issue. On February 12, 1999, the United States Court of Appeals for the Sixth Circuit decided *Williams v. Coyle, 167 F.3d 1036 (6th Cir. 1999)*. In *Williams*, the court held that a habeas case is not pending within the meaning of *Lindh* until the application for the writ is filed pursuant to *28 U.S.C. § 2242*. In rejecting the reasoning of the Ninth Circuit en banc court, the *Williams* panel relied in part on Sixth Circuit precedent that the "*McFarland* interpretation of 'pending'. . . extends no further than is necessary to give effect to *21 U.S.C. § 848(q)(4)B)*." As a result, the Sixth Circuit confined *Hohn* to its facts and limited its holding to a determination that the rejection by the District Court of a certificate of appealability constitutes an appealable order.

In *Moore v. Gibson, 195 F.3d 1152 (10th Cir. 1999)*, the court agreed with the Sixth Circuit's view in *Williams*, that a "case is pending under AEDPA only upon the filing of a petition for writ of habeas corpus" and that "filing of a request for counsel" does not suffice. Similarly, in *Gosier v. Welborn, 175 F.3d 504 (7th Cir. 1999)*, the court reaffirmed the Seventh Circuit's view that filing of

the petition, not the earlier application for appointment of counsel, determines applicability of AEDPA.

One of the prime purposes of certiorari jurisdiction is to bring about uniformity of decisions on matters among the federal courts of appeals. Hence, a square and irreconcilable conflict is usually needed to secure review. See *McElroy v. United States, 445 U.S. 642, 643 (1982)*; *Marks v. United States, 430 U.S. 188, 189 (1977)*. Moreover, to merit review the conflict must also be on an important issue. See *Robert L. Stern, Eugene Gressman, Steven M. Shapiro & Kenneth S. Geller, Supreme Court Practice, § 4.4 at 168 (7th Ed. 1993)*. Given the rapidly diminishing number of cases affected by the holding of the Ninth Circuit, this Court should decline to exercise its jurisdiction.

Finally, this Court usually permits tolerable conflicts to go unaddressed until several courts of appeal have considered a question. As a result, this Court should allow the issue to percolate through the lower courts before accepting it for review. See *McCray v. New York, 461 U.S. 961, 963 (1983)* (Stevens, J.) (certiorari denied when issue requires further study in lower courts before it is addressed by this Court); *Gilliard v. Mississippi, 464 U.S. 867 (1983)* (this Court should postpone consideration of the issue until more state supreme courts and federal circuits have experimented with substantive and procedural solutions to the problem). For that reason, the circuits should be permitted the opportunity to fully develop and adequately frame the issues sought to be resolved by this Court before the question is accepted for review.

B. The Decision of the Court Below is Correct and in Harmony with the Precedents of This Court.

As noted above, the Ninth Circuit analysis of this issue is based on this court's decision in *Hohn v. United States, 524 U.S. 236 (1998)*. The *Hohn* court held that the Supreme Court has

jurisdiction to review decisions of the Courts of Appeals denying applications for certificates of appealability under *28 U.S.C. § 2253(c)*. In reaching this narrow holding, this Court relied on its prior decision in *Ex Parte Quirin, 317 U.S. 1 (1942)*. Of particular relevance to the Court of Appeals was the following passage from *Hohn*:

> In *Ex Parte Quirin, 317 U.S. 1 (1942)*, we confronted the analogous question whether a request for leave to file a petition for writ of habeas corpus was a case in a district court. . . . We held the request for leave constituted a case in the district court over which the court of appeals could assert jurisdiction, even though the district court had denied the request.

In the wake of *Hohn* and specifically the *Kelly* Court's reliance on the holding of *Ex Parte Quirin*, that a threshold request for leave to file a petition for habeas corpus commences the habeas "case," ten judges of the en banc court found *Hohn*'s reasoning irreconcilable with its prior holdings in *Calderon v. United States District Court (Beeler), 182F.3d 1283 (9th Cir. 1997)* and *Kelly III*.

Regardless of the legal question posed, the word "case" means "a proceeding in court, a suit, or action." *Blyew v. United States, 80 U.S. 581, (1871)*. We must, as justice Holmes stated, "accept the plain meaning of plain words." *United States v. Brown, 206 U.S. 240, 244 (1907)*. In this context, the word "case" retains the same meaning, regardless of whether it is used to interpret a statute of limitations or a jurisdictional issue.

The court's recent decision in *Slack v. McDaniel, 120 S. Ct. 1595 (2000)*, reinforces the view that a pre-AEDPA application for appointment of counsel creates a "pending" case, even if the petition itself is filed after AEDPA's effective date. Under *Slack*, an application for a certificate of appealability commences an "appellate case" because it initiates "proceedings in the appellate

courts." *Id. at 1602*. Since an application for appointment of counsel similarly initiates proceedings in the district court, such a filing should be understood to commence a "case" in the district court for purposes of determining AEDPA's applicability to the district court proceedings.

The tie that binds *Hohn* and *Kelly V* is that neither an application for certificate of appealability nor a request for appointment of counsel should be regarded as threshold inquiries separate from the merits, but rather as judicial proceedings to resolve cases or controversies within the meaning of Article III of the Constitution. The assertion that a request for counsel and a stay lack adversity is without merit. Thus, the decision of the Court of Appeals, being indisputably in harmony with *Hohn*, leaves no special or important reason for this Court to review it under the standards of this Court.

II

THE RESULT IN THIS CASE WOULD BE NO DIFFERENT IF AEDPA RULES FOR FEDERAL REVIEW OF STATE COURT DECISIONS ARE APPLIED

The Warden argues that if AEDPA law had been applied to this case, the Court of Appeals would have been compelled to defer to the state court determination. The threshold question under AEDPA is whether a habeas petitioner seeks to apply a clearly established rule of federal law, as determined by the Supreme Court of the United States, at the time his state court conviction became final. There is no question that the Court of Appeals in the instant case did apply clearly established federal law as determined by the United States Supreme Court in concluding that the prosecutor violated Mr. Sandoval's Fifth Amendment rights when he paraphrased passages from the Bible's New Testament in arguing to the jury that the death penalty was sanctioned by God.

In his penalty phase opening statement, Petitioner's counsel asserted that imposition of the death penalty would not "change anything" nor "bring back Anthony Aceves and Gilbert Martinez and the two Wells." (RT 6152). He stated that the death penalty had one effect only — "bottom line is revenge . . . just pure and simple . . . vengeance." (*Ibid.*). Counsel concluded with a plea for a decision based on something other than vengeance:

"Gandhi said we do this eye for an eye thing, make society require it and do it, what happens is the whole world becomes blind. The light is shut out. That's not right. Don't shut out the light. Don't make the world blind. Don't push that button." (RT 6513).

The prosecutor responded to defense counsel by asking for death. In the course of argument, he stated as follows:

> "Defense counsel says don't play God. 'Let every person be in subjection to the governing authorities for there is no authority except from God and those which are established by God. Therefore, he who resists authority has opposed the ordinance of God, and they who have opposed will receive condemnations upon themselves for rulers are not a cause of a fear for good behavior, but for evil. Do you want to have no fear of authority? Do what is good and you will have praise for the same . . . But if you do what is evil, be afraid for it does not bear the sword for nothing for it is a minister of God an avenger who brings wrath upon one who practices evil.'
>
> "You are not playing God. You are doing what God says. This might be the only opportunity to wake him up. God will destroy the body to save the soul. Make him get himself right . . .
>
> ". . . Let him have the opportunity to get his soul right. That's the only way to get his attention. You are not playing God. God ordains authority."
>
> Ms. Kopple: "I'm going to object to these references, your Honor, and ask to approach the bench."
>
> The Court: "Request denied." (RT 6539-6540).

It is well settled that religion may not play a role in the penalty determination process. *United States v. Givy, 818 F.2d 120 (1st Cir. 1987)* (reference to the Bible is improper appeal to jurors' private religious beliefs); *Evans v. Thigpen, 809 F.2d 239 (5th Cir. 1987)* (biblical evidence irrelevant at sentencing phase). In *Jones v. Kemp, 706 F. Supp. 1534 (N.D. Ga. 1989),* the district court granted a petition for writ of habeas corpus, finding constitutional error where the trial court permitted a Bible to go into the jury room at the request of the jurors. The court stated:

> "A search for the command of extrajudicial 'law' from any source other than the trial judge, no matter how well intentioned, is not permitted. The use by deliberating jurors of an extrajudicial code (not already embodied in their own characters) cannot be reconciled with the Eighth Amendment's requirement that any decision to impose death must be the result of discretion which is carefully and narrowly channeled and circumscribed by the secular law of the jurisdiction." *Id. at 1559.*

A prosecutor violates the Constitution when he seeks to "minimize the jury's sense of responsibility for determining the appropriateness of death." *Caldwell v. Mississippi, 472 U.S. 320 (1985).* See also *Darden v. Wainwright, 477 U.S. 168 (1986).* *Caldwell* reversed a death sentence where the prosecutor's argument diminished the jury's sense of responsibility and undermined the reliability requirement of the Eighth Amendment by telling the jurors that their penalty decision was not, in effect, the final one and would be reviewed for correctness by appellate courts. In the instant case, the focus of the prosecutor's argument was precisely that type of diminution of juror authority condemned in *Caldwell*. Here, the prosecutor asked the jury to rely on the extrajudicial law of the New Testament. The portion of the Bible paraphrased by the prosecutor was Romans 13:1-7. The passage also contains Paul's assertion that the "sword of the state" could legitimately be wielded under divine authority against simple lawbreakers. The danger that a jury would be influenced by

this argument is obvious: "[t]o the average juror, . . the Bible is an authoritative religious document . . ." *Jones v. Kemp, supra at 1559.*

Ignoring the foregoing authorities, the Warden asserts that the prosecutor's improper argument did not violate a clearly established rule of federal law as determined by the Supreme Court. In *Williams v. Taylor, 120 S. Ct. 1479 (2000)*, the court provided an authoritative example of a state court ruling found to be "contrary to" Supreme Court law. There, the court majority held that the Virginia Supreme Court's analysis of petitioner's ineffective assistance of counsel claim "contrary to" the court's established precedent. Justice Stevens, speaking for the majority, stated:

> "It is past question that the rule set forth in *Strickland* qualifies as 'clearly established federal law, as determined by the Supreme Court of the United States' for purposes of 2254(d)(1)–and, therefore, does not qualify as a 'new rule' for *Teague* purposes–even when. . .the facts of the ineffective assistance claim before the habeas corpus court are materially different from those in *Strickland* itself."

In a decision issued shortly after *Williams*, *Ramdass v. Angelone, 120 S. Ct. 2113 (2000)*, the court described the *Williams* decision as establishing that a state court determination may be set aside under clearly established federal law where the state court was unreasonable in refusing to extend the governing legal principle to a context in which the principle should have controlled. Thus, a decision need not explicitly articulate a rule in order to "clearly establish" that rule. Certainly the concept of "clearly established law" encompasses rules governing mixed questions of fact and law, even though these rules involve case by case application of the legal standard to the particularized factual context before the court.

Here, the California Supreme Court itself recognized that the prosecutor's argument violated the California and the United States Constitutions. Indeed, the State Supreme Court has frequently

recognized that an appeal to religious authority in support of the death penalty is improper because it tends to diminish the jury's personal sense of responsibility for the verdict and because such arguments carry the potential the jury will believe a higher law should be applied and ignore the trial court's instructions. See *People v. Wrest 3 Cal.4th 1088 (1992)*, and cases cited therein. However, the Sandoval court found "no reasonable possibility that the jury would have reached more favorable verdicts had the misconduct not occurred." *People v. Sandoval, supra, 4 Cal.4th at 194.* In doing so, the court relied on both state law and the federal test established by *Chapman v. Californian, 386 U.S. 18 (1968).* (before a federal constitutional error can be held harmless the reviewing court must be able to declare a belief that it was harmless beyond a reasonable doubt).

The Ninth Circuit specifically relied on United States Supreme Court authority in its analysis rejecting the conclusion of the state court. *Godfrey v. Georgia, 446 U.S. 420, 428 (1980)*, is cited for the principle that under the Eighth Amendment, the death penalty may be constitutionally imposed only when the jury makes findings under a sentencing scheme that carefully focuses the jury on specific factors it is to consider in reaching a verdict. "The biblical concepts of vengeance invoked by the prosecution here do not recognize such a refined approach." *Sandoval v. Calderon, supra, 241 F.3d at 776.*

Moreover, the Court of Appeals relied on *Caldwell v. Mississippi, 472 U.S. 320, 330-34 (1985)*, the seminal case disapproving of an argument tending to transfer the jury's sense of sentencing responsibility to a higher court. "A fortiori, delegation of the ultimate responsibility for imposing a sentence to divine authority undermines the jury's role in the sentencing process." *Id. at 777.*

Finally, the court invoked *Brecht v. Abrahamson, 507 U.S. 619 (1993)*, in its harmless error analysis, stating, "To warrant habeas relief, Sandoval must show that the prosecutor's improper argument 'had [a] substantial and injurious effect or influencing determining the jury's verdict.'" The court concluded: "The prosecutor's allusion to Scripture must have prejudiced Sandoval's chances of receiving life without possibility of parole instead of the death penalty." *Id. at 779.*

Thus, the approach taken by the Ninth Circuit is consistent with the statutory language of the AEDPA as explained in *Williams v. Taylor*, *supra*, and *Ramdass v. Angelone*, *supra*. The federal constitutional principles under which the Ninth Circuit ruled are well-established by the United States Supreme Court.

CONCLUSION

The Warden's certiorari petition raises no meritorious issues for review. The *Kelly V* decision correctly applied this Court's recent decision in *Hohn v. United States* to conclude that a habeas petition is not governed by the AEDPA where federal habeas counsel was appointed to file the petition prior to enactment of that statute.

The Warden's allegation that *Kelly V* creates a conflict with the decisions of other Circuits that justifies certiorari, lacks merit. This issue is irrelevant to the ultimate outcome of this case, since the court's resolution of the issue would be no different under AEDPA. The Ninth Circuit decision is founded on rules of federal law as determined by the United States Supreme Court–the AEDPA standard of review. Nor is the issue of sufficient importance to justify certiorari, since it affects a limited and diminishing number of habeas petitioners. Finally, this issue does not merit certiorari, since the law on this issue is still developing in light of this Court's recent decision in *Hohn v. United States*.

For all these reasons, the Warden's Petition for Writ of Certiorari should be denied.

DATED: June 21, 2001.

LAW OFFICES OF MICHAEL S. MAGNUSON

By: _____
MICHEL S. MAGNUSON, Attorney for
Respondent ALFRED ARTHUR SANDOVAL

DATED: June 21, 2001.

LAW OFFICES OF MANUEL U. ARAUJO

By: _____
MANUEL U. ARAUJO, Attorney for
Respondent ALFRED ARTHUR SANDOVAL

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to the within action; my business address is 13215 E. Penn Street, Suite 205, Whittier, California 90602. On June 22, 2001, I served the foregoing document(s) described as OPPOSITION TO PETITION FOR WRIT OF CERTIORARI on the interested parties in this action as follows:

____ **By FAX transmission**

_X_ **By placing** _____ the original _X_ a true copy thereof enclosed in sealed envelopes addressed as follows:

BILL LOCKYER
Attorney General of California
Jeffrey Kahan
Deputy Attorney General
300 S. Spring Street
Los Angeles, CA 90013

Alfred Sandoval
D#61000 2-AC-12
San Quentin Prison
San Quentin, CA 94974

Manuel U. Araujo, Esq.
8484 Wilshire Blvd., Suite 605
Beverly Hills, CA 90211

_X_ **BY MAIL:**

_X_ I deposited such envelope in the mail at Whittier, California. The envelope was mailed with postage thereon fully prepaid.

_X_ As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with the U. S.Postal Service on that same day with postage thereon fully prepaid at Whittier, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after day of deposit for mailing in affidavit.

___ **BY PERSONAL SERVICE** -- I caused such envelope to be delivered by hand to the offices of the addressee. **Proof of Service** to be filed.

_X_ **(State)** I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

__ **(Federal)** I declare that I am employed in the office of a member of the Bar of this court at whose direction the service was made.

SANDRA PEREZ
Name of Declarant

Signature of Declarant